

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MM Docket No. 89-120
FM Broadcast Stations.)	
(Northweye, Cuba, Waynesville,)	
Lake Ozark, and Eldon, Missouri))	
)	
(Brookline, Missouri))	MM Docket No. 90-195
)	
(Ava, Branson, and)	MM Docket No. 91-352
Mountain Grove, Missouri))	
)	
(Columbia, Bourbon, Leasburg,)	MM Docket No. 92-214
Gerald, Dixon, and Cuba, Missouri))	

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

Adopted: March 27, 2002

Released: April 18, 2002

By the Commission:

1. The Commission has before it a December 3, 2001 Application for Review of a Memorandum Opinion and Order (“MO&O”), DA 01-2567, 16 FCC Rcd 19423 (Allocations Br. 2001) in the above captioned proceeding, filed by Lake Broadcasting, Inc. (“Lake”), the former licensee, *inter alia*, of Station KBMX (FM), Eldon, Missouri, and the former permittee of Station KXFE(FM), Cuba, Missouri. Lake seeks review of the MO&O insofar as it dismissed its petition for reconsideration in MM Docket No. 89-120 and terminated that proceeding. Lake is not appealing the MO&O’s termination of MM Dockets Nos. 90-195, 91-352, and 92-214.

Background

2. In MM Dockets 89-120 and 92-214, Lake sought to upgrade the classes of Stations KBMX(FM), Eldon, Missouri and KXFE(FM), Cuba, Missouri, which at the time the rulemakings were begun, were authorized to Lake. Lake’s upgrades were not granted,¹ and Lake filed petitions for reconsideration in MM Dockets 89-120 and 92-214. Lake also filed petitions for reconsideration in MM Docket Nos. 90-195 and 91-352, arguing that actions in those subsequent rulemaking proceedings

¹ See Report and Order in MM Docket No. 89-120, 7 FCC Rcd 1449 (Allocations Br. 1992). In this proceeding, Lake filed a counterproposal to upgrade the Eldon station from Channel 270A to Channel 270C1. See also Report and Order in MM Docket No. 92-214, 16 FCC Rcd 8704 (Allocations Br. 1995). In this docket, Lake filed a counterproposal for a nonadjacent upgrade of Station KXFE, Cuba, Missouri, from Channel 271A to Channel 297C3.

prejudiced Lake's petition for reconsideration in MM Docket 89-120.² The Chief, Allocations Branch, dismissed Lake's petitions for reconsideration in these four separate rulemaking proceedings as moot³ because the Commission had, in the interim, revoked all of the stations licensed to Lake or controlled by its principal shareholder, Michael Rice.⁴ The basis for the license revocations was Michael Rice's conviction and incarceration for six counts of deviate sexual assault in the first degree and two felony counts of deviate sexual assault in the second degree. In addition, the Commission concluded that there had been misrepresentations and a lack of candor by the stations controlled by Rice as to his further involvement in the management and operation of those radio stations subsequent to his convictions. The U.S. Court of Appeals for the D.C. Circuit affirmed those actions, and the U.S. Supreme Court denied *certiorari*. See Contemporary Media, Inc. et al. v. Federal Communications Commission, 214 F. 3d 187 (D.C. Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1355 (2001). Rice did not seek rehearing before the U.S. Supreme Court, and those station revocations are, therefore, final.

3. Thereafter, Lake filed petitions for reconsideration in each of the above-captioned proceedings. In those petitions, Lake argued that the dismissal of its reconsideration petitions as moot was premature because, at that time, Lake was authorized to operate its stations and it intended to file with the Commission a request for extension of its operating authority and additional equitable relief. In the MO&O before us for review, the staff consolidated the four petitions for reconsideration and disagreed that their dismissal as moot was premature. The staff reasoned that Lake's former license for Station KBMX (FM), Eldon, Missouri, and its former construction permit for Station KFXE-FM, Cuba, MO, could not be upgraded because those authorizations were revoked and those actions became final thirty days after the U.S. Supreme Court denied *certiorari*. In addition, the MO&O noted that the staff had denied Lake's request for special equitable relief, finding that it was "an untimely collateral challenge to a proceeding that has been final since April 13, 2001, the deadline for seeking rehearing of the Supreme Court's denial of *certiorari*." See Public Notice, DA 01-1441, released July 3, 2001 at 5. Further, the MO&O pointed out that the Commission had ordered Rice and his wholly owned companies to cease broadcast operations of all of their formerly licensed stations no later than 11:59 PM on October 3, 2001. See Memorandum Opinion and Order, FCC 01-300, released October 3, 2001. The Commission's decision directing the cessation of broadcast activities also affirmed the staff's dismissal of Lake's petition for equitable relief.

Application for Review

4. In its application for review, Lake seeks to raise two issues that it believes warrant reinstatement of its petition for reconsideration in MM Docket 89-120. First, Lake argues that the MO&O committed reversible procedural error by holding that the dismissal of its petition for reconsideration in MM Docket 89-120 as moot was not premature. In support of this position, Lake notes that on November 1, 2001, Lake filed a notice of appeal in the United States Court of Appeals for the District of Columbia Circuit *sub nom.* Michael S. Rice, Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc. v. FCC (Case No. 01-1474), appealing the above referenced Memorandum Opinion and Order, FCC 01-300, that had affirmed the staff's dismissal of Lake's petition for equitable relief. Lake alleges that, since finality has not occurred concerning Lake's efforts to preserve and resurrect its authorization for Station KBMX (FM), it was premature for the staff to terminate MM Docket No. 89-120. Second, Lake argues that, regardless of whether Lake remains the

² Likewise, in its petition for reconsideration in MM Docket No. 92-214, Lake also argued that another action taken in that proceeding prejudiced its petition for reconsideration in MM Docket 89-120.

³ See Memorandum Opinions and Orders in Docket Nos. 89-120, 90-195, 91-352, and 92-214 at 16 FCC Rcd 7982(2001); 16 FCC Rcd 8693 (2001); 16 FCC Rcd 8701 (2001); and 16 FCC Rcd 8704 (2001), respectively.

⁴ See Initial Decision, 12 FCC Rcd 14,254 (ALJ 1997), *aff'd*, Memorandum Opinion and Order, FCC 01-300 (released October 3, 2001).

licensee of Channel 270A at Eldon, Missouri, the channel should be upgraded to Channel 270C2 for scientific and public interest reasons.⁵

Discussion

5. After careful consideration, we will deny Lake's application for review and affirm the termination of MM Docket 89-120 because we agree that the MO&O properly concluded that the dismissal of Lake's petition for reconsideration in MM Docket 89-120 as moot was not premature. As we recently explained in another proceeding, in which we denied Rice's application for review of the staff's dismissal of its petition for equitable relief:

Rice's Application for Review, like his Petition, assumes without discussion that there is some legal basis for permitting Rice to 'retain his radio properties' despite the fact that the Commission has revoked the licenses for those stations in an action that became final and no longer subject to judicial review before Rice filed the petition at issue here. In this regard, the application for review is contrary to well-settled principles of finality. See Greater Boston Television Corp. v. FCC, 463 F.2d 268, 336 (D.C. Cir. 1972), cert denied, 406 U.S. 950 (1972); Crosthwait v. FCC, 584 F.2d 550, 556 (D.C. Cir. 1978); and Gonzales Broadcasting, Inc., 14 FCC Rcd 10,951 (1999).⁶

Since the revocation of the license for Station KBMX (FM), Eldon, Missouri, had already become final, it was not premature for the staff to dismiss Lake's reconsideration in MM Docket 89-120 as moot. Lake's appeal in the United States Court of Appeals for the D.C. Circuit of the Commission's denial of its request for special relief is irrelevant because that filing did not change the fact that the license revocations were final. Our view is further buttressed by the fact that we recently reviewed Rice's request for equitable relief in the proceeding quoted above and concluded that "we are not persuaded that anything has been presented that suggests that there was any injustice or fraud in the proceedings that led to the revocation of these licenses. Indeed, we find nothing in the petition that would have warranted reopening the hearing if Rice's claims had been timely raised."⁷ Under these circumstances, dismissing Lake's petition for reconsideration as moot in MM Docket No. 89-120 was proper.

6. Finally, we will not upgrade Channel 270A at Eldon, Missouri, to Channel 270C2. Under Section 1.420(g) of the Rules, only a licensee or permittee of an FM station may seek an upgrade to a higher class, adjacent FM Channel and a modification of its station authorization.⁸ Indeed, we have denied requests by applicants to upgrade the classes of FM channels because they are not the holders of a station authorization.⁹ Since Lake's authorization for Channel 270A has been revoked, we will not

⁵ Lake has abandoned its original pursuit in MM docket No. 89-120 of its request to upgrade Station KBMX (FM) to Channel 270C1.

⁶ Memorandum Opinion and Order denying August 2, 2001 Application for Review filed by Michael Rice of the July 3, 2001 Public Notice, FCC 02-65, released February 28, 2002, at 2-3, para. 5.

⁷ Id. At para. 6.

⁸ See, e.g., Santa Margarita and Guadalupe, CA, 2 FCC Rcd 6930, 6931 (Allocations Br. 1987), recon. denied, 4 FCC Rcd 7887 (Policy and Rules Div. 1989), application for review dismissed, 7 FCC Rcd 4552 (Comm. 1992); Mount Pleasant, Iowa, 10 FCC Rcd 12069 n.1 (Policy and Rules Div. 1995); and Lafayette, Louisiana, 4 FCC Rcd 5073, 5076 notes 9 and 13 (Comm. 1989), aff'd by judgment sub nom. Crisler v. FCC, 919 F.2d 182 (D.C. Cir. 1990).

⁹ See Santa Margarita and Guadalupe, CA, 2 FCC Rcd at 6931.

upgrade the channel class. However, whoever becomes the holder of a construction permit or a license for that channel may file a rulemaking petition for an upgrade.¹⁰

7. Accordingly, IT IS ORDERED, That the December 3, 2001 Application for Review filed by Lake Broadcasting, Inc. IS DENIED.

8. IT IS FURTHER ORDERED, That MM Docket 89-120 IS TERMINATED.

9. IT IS FURTHER ORDERED, That MM Dockets 90-195, 91-352, and 92-214 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

¹⁰ To the extent that Lake suggests alternate bases for upgrading the channel (i.e. scientific or public interest reasons) that are not dependent upon whether Lake remains the licensee at Eldon, we do not believe that it would be appropriate to do so in this proceeding. Any party interested in upgrading a vacant but unapplied for channel may petition to amend the FM Table of Allotments provided that the proposal works technically and that there is a valid expression of interest.